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Attorneys for Plaintiff

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

KATHERINE ELIZABETH NEIMER,	:	Docket No. 02-CV-4034
a minor, by and through JAMES J. NEIMER	:	
and REBECCA NEIMER, her parents and	:	
natural guardians,	:	
Plaintiffs	:	
	:	
v.	:	
	:	Assigned to:
CITY OF LANCASTER, LANCASTER	:	Honorable Clarence C. Newcomer
RECREATION COMMISSION, and	:	
ISMAEL ALVAREZ,	:	Jury Trial Demanded
Defendants	:	

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56**

Plaintiff, Katherine Elizabeth Neimer ("Katie"), a minor, by her parents and natural guardians, James Neimer and Rebecca Neimer moves for judgment in her favor and against Defendant Ismael Alvarez ("Alvarez") on the grounds that there exists no genuine issue of material fact and Plaintiff is entitled to judgment as a matter of law. Furthermore, Alvarez does not oppose entry of Judgment in favor of Plaintiff and against Alvarez. Alvarez does not oppose assessment of damages in the amount of One Million Dollars.

Date: April 9, 2004

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Attorneys for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

KATHERINE ELIZABETH NEIMER,
a minor, by and through JAMES J. NEIMER
and REBECCA NEIMER, her parents and
natural guardians,
 Plaintiffs

v.

CITY OF LANCASTER, LANCASTER
RECREATION COMMISSION, and
ISMAEL ALVAREZ,
 Defendants

: Docket No. 02-CV-4034

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: Assigned to:

: Honorable Clarence C. Newcomer

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: Jury Trial Demanded

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**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56**

I. BACKGROUND

This case is an action brought pursuant to 42 U.S.C. §1983 by the Plaintiff, Katherine Elizabeth Neimer ("Katie"), a minor, by her parents and natural guardians, James Neimer and Rebecca Neimer. This case stems from two (2) incidences of premeditated sexual assault perpetrated upon Katie by Alvarez when he was her fourth grade teacher. On December 21, 2000 and again on December 22, 2000, Alvarez removed Katie from a Before School Program located on the premises of the Hamilton Elementary School to the classroom to which Alvarez and Katie were assigned as teacher and student, respectively. Once inside the isolated and empty classroom which was located a significant distance from the location of the Before School Program, Alvarez proceeded to sexually assault Katie by fondling her breasts and genitalia both over and under her clothing.

Consequently, Alvarez was arrested, and ultimately pled guilty to two counts of Indecent Assault and one count of Corruption of the Morals of a Minor. Alvarez was sentenced to eight to twenty-three months in prison, two years of probation, fines, restitution, and registration under Pennsylvania's version of Megan's Law for ten years.

Plaintiff initially filed her complaints for civil rights violations and pendent state law tort claims against Alvarez, the Lancaster School District; its Superintendent, Vicki Phillips; the building principal at Hamilton Elementary School, Gloria Campbell; the City of Lancaster, the Lancaster Recreation Commission and its Chairman, Donald Yeager. The School District Defendants and Yeager were dismissed from the case under Rule 12(b)(6), with the claims remaining against Alvarez, the City, and LRC. Subsequently, Plaintiff settled her surviving §1983 claims against the City of Lancaster and the Lancaster Recreation Commission. Plaintiff's state law claims against Alvarez remain.

II. ARGUMENT

Legal standard for summary judgment

Federal Rule of Civil Procedure 56 provides in Pertinent part.-

Rule 56. Summary Judgment

(A) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgement may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

In deciding a motion for summary judgment, the "test is whether there is a genuine issue of material fact, and if not, whether the moving party is entitled to judgment as a matter of law.

Mohney v Metropolitan Life Insurance Company, 2004 U.S. App. LEXIS 5468 (3d Cir. 2004)

citing **Medical Protective Co. v Watkins**, 198 F. 3d 100, 103 (3d Cir. 1999). The facts must be viewed in the light most favorable to Alvarez as the non-moving party. **Matsushita Elec. Indus. Co. Ltd. v Zenith Radio Corp.**, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S.Ct. 1348 (1986).

The facts of Alvarez' premeditated sexual assaults upon the minor Plaintiff Katie are undisputed, uncontested and without defense. The Plaintiff is entitled to judgment as a matter of law.

WHEREFORE, Plaintiff requests entry of judgment in her favor and against Defendant Alvarez and entry of judgment in the amount of one million dollars.

Respectfully submitted,

Date: April 9, 2004

REIFF & BILY

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CERTIFICATE OF SERVICE

AND NOW, this 8th day of April, 2004, I, Raymond M. Bily, Esquire, hereby certify that I served a true and correct copy of the Plaintiff's Motion for Summary Judgment and Memorandum of Law in Support of Plaintiff's Motion, upon all counsel of record by depositing a copy of same in the United States mail, regular delivery, postage prepaid at Philadelphia, Pennsylvania, addressed as follows:

Edward H. Rubenstone, Esquire
Lamm, Rubenstone, Totaro & David, LLC
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Bensalem, PA 19020,

RAYMOND M. BILY